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Supreme Court of the United States.

October Term, 1906.

No. 275.

Office Supreme Court, U. S.
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JAMES H. McKENNEY
Clerk

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, Appellants,

vs.

VICKSBURG WATER WORKS COMPANY.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

GEORGE ANDERSON,
HANNIS TAYLOR,
Counsel for Appellants.

Press of Gibson Brothers,
Washington, D. C.
1907.

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THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, *Appellants*,

v.

VICKSBURG WATERWORKS COMPANY.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

STATEMENT OF THE CASE.

After two appeals involving preliminary and incidental questions the case is now, for the first time, presented on its merits. As the composition of the court has changed during the progress of the litigation, a more complete statement must be made of the antecedents than would have otherwise been necessary. An effort will be made so to state the cardinal questions presented by each of the appeals that the court may see at a glance the precise subject-matter involved in each of the three records.

The First Appeal Involved only a Question of Jurisdiction.

In Vicksburg Waterworks Company *v.* Vicksburg, 185 U. S. 65, the case was thus stated by this court: "By an act of legislature of the State of Mississippi, approved on the 18th day of March, 1886, the city of Vicksburg was authorized 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.'

"The city received competitive bids for the construction and maintenance of said waterworks, and on November 18, 1886, at a special meeting of the board of mayor and aldermen, a committee reported that a bid made by Samuel R. Bullock and Company, of New York, was the best bid, and submitted the draft of an ordinance, entitled 'An ordinance to provide for a supply of water to the city of Vicksburg, in Warren County, Mississippi, and to its inhabitants, contracting with Samuel R. Bullock and Company, their associates, successors and assigns, for a supply of water for public use, and giving the city of Vicksburg an option to purchase said works.' This ordinance was then adopted in terms as follows:

"'Sec. 1. That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, unto Samuel R. Bullock and Company, their associates, successors and assigns, of erecting, maintaining and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares, and all other public places within the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may be now or hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the city of Vicksburg, Mississippi, and to its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

"'The said Samuel R. Bullock and Company, their associates, successors and assigns, shall exercise the greatest care

and diligence in the use of the said streets, alleys, public squares and other public places, and shall cause no unnecessary obstruction of, or interruption to, the public travel over or upon the same, or any injury to or interference with any pipes, mains, sewers, which may now be lawfully located beneath the surface there of.

"'The said Samuel R. Bullock and Company, their associates, successors and assigns, shall take every precaution to provide against danger to property, life and limb by reason of the exercise of the rights and privileges hereby granted, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purposes for which the said streets, alleys, public squares and other public places may be used, they shall be restored to their former condition as near as may be without unnecessary delay, and they shall at their own cost and expense relay their mains and pipes made necessary by a change of grade in any street ordered by the board of aldermen of said city if there was no established grade for such street at the time said mains and pipes were laid. On failure to restore said streets, alleys, public squares and other places as aforesaid, the mayor and aldermen of the city of Vicksburg may, on reasonable notice to them by any city officer, cause the same to be restored and recover the costs and expenses thereof from the said Samuel R. Bullock and Company, their associates, successors and assigns, in any court having jurisdiction of the amount.

"The said Samuel R. Bullock and Company, their associates successors and assigns, hereby agree to hold the mayor and aldermen of the city of Vicksburg harmless from any liability which may result to it by reason of any violation of this section.

"'Sec. 2. The general plan of the said system of waterworks shall be as follows:

"'*Mains.* The pipe system shall consist of not less than twelve (12) miles of mains of sizes varying from sixteen inches (16) to six (6) inches in diameter. The pipe used shall be of the best quality of cast iron pipe and each pipe shall be tested at its place of manufacture to a pressure of three hundred (300) pounds to the square inch. All pipe shall be coated with Dr. Angus Smith's preservative varnish, and shall be laid and jointed by competent mechanics and in the best possible manner.

"'The streets along which and at what points said mains shall be laid shall be first designated by the board of mayor and aldermen of the city of Vicksburg.

"'*Hydrants*. The hydrant shall be double-nozzle fire hydrants with nozzles fitted to connect with the hose couplings now in use by the fire department of said city of Vicksburg.

"'The board of mayor and aldermen of the city of Vicksburg shall within thirty (30) days from the date of the final passage of this ordinance designate the points on the line of distributing mains at which the hydrant shall be erected.

"'*Gates and valves*. All the necessary gates and valves shall be provided and located at such points on the lines of mains as will enable certain districts to be cut off and isolated when repairs are needed without depriving other districts of their full supply.

"'*Pumps*. The pumping plant shall consist of two pumping engines each capable of pumping two millions (2,000,000) of gallons of water per day of twenty-four (24) hours against the pressure needed to supply all parts of the pipe system with an abundant supply of water. They shall be so arranged as to be operated separately or together.

"'*Boilers*. The boilers shall be of ample capacity to operate the pumping engines and shall be so arranged as to be operated separately or together as may be required.

"'*Stand-pipe*. There shall be a stand-pipe or reservoir of sufficient capacity and height or elevation to furnish an ample supply of water for consumption at the highest points along the line of the mains.

"'*Pump-house*. The pumps and boilers house shall be a substantial stone or brick building of ample size for the pumps and batteries of boilers.

"'*Source of supply*. The water shall be taken from such points as may be free from all sewerage contamination, and shall be good, wholesome water fit for all purposes of domestic or manufacturing consumption.

"'Sec. 3. In consideration of the public benefit and the protection to property resulting from the construction of the said system of waterworks, the mayor and aldermen of the city of Vicksburg hereby rent to the said Samuel R. Bullock and Company, their associates, successors and assigns, not less than eighty (80) double-nozzle frost-proof fire hydrants for the aforesaid period of thirty (30) years at the annual rate of sixty-five ($65) dollars for each hydrant, to be payable semi-annually on the 15th days of January and July. After the first year of the operation of said waterworks the said city hereby rents not less than ten (10) hydrants in addition to said eighty (80) for the unexpired period of said

thirty years; the first one hundred (100) hydrants shall be located on the original twelve (12) miles of mains at said annual rental of sixty-five ($65) dollars payable as aforesaid and for the remainder of said period of thirty years unexpired at the time of placing each of said hydrants.

"'The rental of all hydrants in excess of said one hundred hydrants hereafter erected on the line of distributing mains or on the extensions thereof as hereinafter provided at the request of the said mayor and aldermen of the city of Vicksburg, shall be at the annual rate of fifty (50) dollars for each hydrant, payable as aforesaid, during the unexpired period of the said original term of thirty (30) years. Water shall be used from the said hydrants for the extinguishment of fires and necessary fire practice and for flushing sewers and gutters only, provided that for fire practice and flushing sewers no more than two hydrants shall at opened be one time and not more than once in each week.

"'Sec. 4. Water shall be furnished free of charge to the public schools, and all other buildings used exclusively for city purposes, and for filling public cisterns, and the city hospital shall also be supplied with water free by a supply pipe whenever the mains shall be laid within seven hundred and fifty (750) feet of said hospital. And water shall also be supplied free for six (6) drinking fountains with openings for man and beast and one public fountain to be erected by the said Samuel R. Bullock and Company, in such place on the line of mains as the board of mayor and aldermen of the city of Vicksburg may direct.

"'Sec. 5. That said Samuel R. Bullock and Company, their associates, successors or assigns, may procure the organization of a waterworks corporation under the laws of any State, and may assign to it all the rights and privileges acquired hereunder. Provided that such assignment shall not invalidate or affect the bond required by section seven (7) hereof and no assignment thereof shall be valid unless such assignee shall in writing to aforesaid board of mayor and alderman accept this ordinance and become bound by its terms and obligations. And the said mayor and board of aldermen shall pass and enact such further and other ordinance and do and perform such other acts, including the repassage of this ordinance, in favor of the said corporation the rights and privileges hereby granted.

"'Sec. 6. Upon the completion of the construction of the said system of waterworks the said Samuel R. Bullock and Company, their associates, successors and assigns, shall

notify the mayor and aldermen of the city of Vicksburg to that effect in writing, and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw four (4) fire streams through one hundred feet and one-half-inch hose and one-inch nozzle from four (4) different hydrants a stream not less than fifty (50) feet high at the highest location on which any such hydrants are located. On the satisfactory performance of this test the said board of mayor and aldermen shall formally accept said system if constructed in accordance with the terms of this ordinance.

"'Sec. 7. Within fifteen days after the day this ordinance takes effect the said Samuel R. Bullock & Company, their associates, successors or assigns, shall file their written acceptance thereof, binding themselves to its terms and obligations, in the office of the city clerk, accompanied by their bond in the penal sum of ten thousand (10,000) dollars with two or more sufficient sureties to be approved by said board of mayor and aldermen executed to the mayor and aldermen of the city of Vicksburg and conditioned for the faithful compliance with the terms of this section. On failure to file such bond within said time this ordinance shall become null and void. But if said board shall not approve a bond so filed, said board may in its discretion grant additional reasonable time within which to file another bond.

"'The construction of the said system shall be commenced within sixty days after this ordinance takes effect, and said system shall be completed within eighteen (18) months after the commencement of the construction thereof; provided however, that the time during which the said Samuel R. Bullock & Company, their associates, successors or assigns, are delayed by floods, act of God or the public enemy, legal proceedings for the maintenance or defence of their legal rights or in the acquisition of property or right of way, or by reason of any other causes whatever beyond their control, shall form no part of the time limited in this ordinance for the performance of any act required by the terms thereof to be done by them, but they shall use all due diligence to remove any such obstructions or delays.

"'Sec. 8. The said board of mayor and aldermen of the city of Vicksburg shall from time to time pass and enact ordinances under suitable penances providing for the protection of the said works from damage, fraud or imposition.

"'Sec. 9. At the expiration of each period of ten years after this ordinance takes effect, the mayor and aldermen of the

city of Vicksburg shall have the right and privilege to purchase the said system of waterworks, provided they notify the said Samuel R. Bullock & Company, their associates, successors or assigns, of their intention to do so, at least one year before the exipration of the said period of ten years.

"'The value of the said system shall be ascertained as follows: The said Samuel R. Bullock & Company, their successors, associates and assigns, and the board of mayor and aldermen of the city of Vicksburg shall severally appoint one person, the two appointees shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of waterworks. None of the board shall be residents of the said Warren County. The said mayor and aldermen of the city of Vicksburg shall, within sixty days after the said board have rendered its decision, pay the amount awarded in cash. A failure to so pay the award or to give notice of intention to purchase as above provided shall operate as a waiver of the right to purchase until the expiration of the next succeeding period of ten years.

"'Sec. 10. The said Samuel R. Bullock & Company, their associates, successors and assigns, shall make extensions to their line of mains whenever called upon to do so by the mayor and aldermen of the city of Vicksburg. Provided, however, that said extensions shall not be less than five hundred feet in length and that one public hydrant shall be located on each five hundred feet or major portion thereof; and further provided, that two-thirds of the residents on the line of such extension shall agree to take water at the established rate for a period of at least two years, but the said Samuel R. Bullock & Company, their associates, successors and assigns, may voluntary make such extensions from time to time as they may deem necessary.

"'Sec. 11. After the works are put in operation, if at any time the pressure gauges located at the points hereinbefore named should indicate a pressure of less than twenty pounds (20) on the distributing mains at the highest point of elevation for the period of two weeks in succession, then the rentals for the use and employment of the hydrants for the purposes aforesaid shall cease until the standard of pressure in this section provided shall be attained; provided, however, if the pressure indicated as aforesaid shall be less than twenty pounds for two calendar months in succession then all the rights, and privileges of the said Samuel R. Bullock & Company, their associates, successors and assigns, acquired by

virtue of this ordinance shall at the option of said board of mayor and aldermen made in writing, cease, determine and be null and void. But nothing herein contained shall be so construed as to prevent the said Samuel R. Bullock & Company, their associates or assigns, from temporarily shutting off the water from its said system or any portion thereof, for the purpose of making repairs or extensions to the same; and no liability shall attach to the said Samuel R. Bullock & Company, their associates, successors and assigns, for the suspension of the supply of water; provided, the repairs or extensions are made and the water turned on again without unnecessary delay. But the city shall not be liable to pay the rental for any hydrant during such time as the proper supply of water cannot be procured therefrom.

"'Sec. 12. Be it further ordained, that as part of the consideration for the performance of the duties and obligations hereby imposed on the said Bullock & Co., their associates, successors and assigns, the said waterworks and the property and business pertaining thereto and employed in and about said system shall be exempt from all municipal taxation during the first five years of their operation, and all the property and business pertaining to and employed in and about said system, of waterworks shall hereinafter, during each year for the balance of the period of this contract, be assessed for taxation by said city at a valuation not to exceed the sum of fifty thousand dollars ($50,000).

"'Sec. 13. The said Samuel R. Bullock & Company, their associates, successors or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water as they may determine; provided, that said rates and charges shall not exceed fifty cents for each one thousand gallons of water.

"'Sec. 14. *Be it further ordained*, That for the purpose of paying the obligations and liabilities of the said mayor and aldermen of the city of Vicksburg, which shall accrue to the said Samuel R. Bullock & Company, their associates, successors or assigns, by virtue of the terms and conditions of this ordinance, the said mayor and aldermen of the city of Vicksburg or other duly constituted municipal authorities shall annually levy and cause to be collected upon the taxable property of said city a special tax, to be known and designated as the waterworks tax, sufficient to meet and pay all said obligations and liabilities during the continuance of this

contract, and until all of said obligations shall be paid and discharged.

"'Sec. 15. *Be it further ordained*, That this ordinance shall take effect from and after its approval by the mayor. Ordained this 18th day of November, 1886.'

"On March 1, 1887, Samuel R. Bullock & Company assigned and transferred, under and by virtue of the fifth section of the aforesaid ordinance, all their rights and privileges acquired under the ordinance of the Vicksburg Water Supply Company, incorporated under the laws of the State of Mississippi, and the said company accepted in writing the said ordinance.

"The bill further alleges the construction of the said water plant, in accordance with the specifications contained in the ordinance, and the city accepted the same; that since the completion and acceptance of said waterworks, during a period of fourteen years up to about July, 1900, and the said company fully complied with all the terms of the ordinance, and no complaint was made by the city with respect to the execution of the company's part of the contract, and the city, without question, paid to the water company the semi-annual payments stipulated for in the ordinance; that on the 8th day of August, 1900, a mortgage that the said company had previously made, and which had fallen into default, was foreclosed, and all the franchises, ordinances, contracts and property described and conveyed in said mortgage deed were sold to the Vicksburg Waterworks Company, a corporation under the laws of the State of Mississippi, doing business in the city of Vicksburg, and which became the owner of said waterworks property and entered into operation of the same; that on October 18, 1900, the said The Vicksburg Water Supply Company executed a quitclaim deed to the said The Vicksburg Waterworks Company, conveying and assigning all rights, titles and interests it might have or might thereafter acquire in said waterworks property, franchises, ordinances and contracts; that the Vicksburg Waterworks Company gave the city notice in writing of the said purchase and assignment, with a written acceptance of the terms and provisions of the said ordinance; that since the completion and acceptance of the said waterworks the city continuously received and used the water furnished by said waterworks, during a period of about fourteen years; and said water has at all times been and now is good and wholesome for public and private use, and adequate in supply for the needs of the city and its inhabitants; that

said water so furnished from the time the city first received and accepted the same up to the present time is and has at all times been the same character and supply of water, and is and at all times has been in accordance with the said ordinance and contract entered into with said city by said S. R. Bullock & Company, the said Vicksburg Water Supply Company, and the said Vicksburg Waterworks Company, and the pressure maintained has at all times been and is now greater than required by said ordinance and contract.

"Upon these allegations, the appellants claim that a contract was entered into between the city and S. R. Bullock & Company and their assigns, the Vicksburg Water Supply Company and the Vicksburg Waterworks Company, which contract still exists and is within the protection of the Constitution of the United States."

Upon the statement of the case thus made this court said in its opinion: "*The sole question for our consideration is whether the bill, as originally filed and as amended, presented a* FEDERAL QUESTION. As the party plaintiff and the party defendant were both corporations and citizens of the same state, the circuit court of the United States could not take jurisdiction of the controversy between them unless the complainant laid grounds for that jurisdiction by asserting rights arising under the constitution or laws of the United States, and such assertion must appear in the complainant's statement of its own claim. Metcalf *v.* Watertown, 128 U. S. 586; Tennessee *v.* Union and Planters Bank, 152 U. S. 454; Blackburn *v.* Portland Gold Mining Company, 175 U. S. 571." After thus declaring that "the sole question" before it was whether or no the record presented a Federal question, this court held: (1) A case presented by a bill in equity which alleges that a contract right of a waterworks company with whose predecessors a municipality with legislative sanction, contracted for a municipal water supply, is impaired by an ordinance directing that the Waterwords Company be notified that the city denies any liability on any contract for the use of hydrants, and by the subsequent action of the city in holding an election to authorize an issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the

terms of the contract, is one so arising under the laws and constitution of the United States as to give a circuit court of the United States jurisdiction; (2) apprehension that such illegal action may be taken by municipality as will impair the franchise and contract rights of a waterworks company with whose predecessor the city has contracted for a municipal water supply, entitles the company to maintain a suit for equitable relief in advance of any actual proceedings on the part of the city to impair the company's rights under the contract.

The record discloses the fact that the appeal was taken under Sec. 5 of the Act of 1891 which provides: "In such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." The trial judge "certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this case, whether this cause presents a controversy which involves a Federal question under the laws or the constitution of the United States." It is therefore certain that the merits of this case were in nowise involved in this preliminary appeal confined by its terms to the question of jurisdiction alone.

THE SECOND APPEAL LIMITED TO THREE QUESTIONS.

After the first appeal had settled the question of jurisdiction the case went back to the circuit court where, after the filing of an answer by defendant, proof was taken. Upon the submission that followed, the court made a decree on May 18, 1894. Of that decree this court has said: "The decree in the case below was in favor of the waterworks company maintaining its right to the contract for hydrant rentals, and enjoining the city during the period of the contract, from constructing a waterworks system of its own, and requiring the city to construct a sewer for the disposal of house sewerage from the city. The assignments of error necessary to be considered are:

"1. As to the alleged error of the court below in permitting

a corporation known as the City Waterworks and Light Company, which had intervened in the case, to withdraw from the files its original bill in the nature of a supplemental bill, and striking out certain testimony which had been taken concerning the same.

"2. In enforcing the contract with the city in favor of the complainant, and restraining the city from erecting waterworks of its own during the term covered by the contract with the complainant.

"3. In requiring the construction of the sewer by the city."

To those three questions as thus stated the opinion of this court, on the second appeal, was strictly confined. The first assignment of error, presenting a question of practice, was disposed of by the declaration that it was within the discretion of the trial court "to permit the withdrawal of these pleadings and the suppression of this testimony, and it was likewise within its discretion to permit or deny a further answer by the city setting up the alleged transfer of ownership." Thus that question passed out of the case. The second assignment of error, presenting what the court described as "the principal controversy in the case," was disposed of by an adjudication in which it was held, in the language of the head note, that "while grants of franchises are to be strictly construed in favor of the public and nothing is to be taken by implication, where the city has, as in this case, by the terms of the contract given the grantee the exclusive right to erect, maintain and operate waterworks for a definite period, it can not, under the impairment clause of the constitution, erect and operate, under ordinances subsequently enacted, its own water system during the life of the franchise and subject the company to that competition." Thus that question passed out of the case. In no shape or form is it represented on this appeal. The third assignment of error, involving the legislative power that still remains in the municipality unrestrained by the terms of the contract in question, was disposed of by this adjudication: "The court decreed as to a sewer, which the record discloses was originally a surface-water sewer, that the city should re-

frain from permitting future connections therewith for the conveyance of house sewage. The Company complaining that this sewer entered into the source of supply above the intake of the waterworks, the court by a mandatory injunction required the city of Vicksburg to extend the sewer and construct an outlet therefor, so as to discharge sewage into the Yazoo or Mississippi river, below the intake of the complainant, provided, if the city was unable to construct such sewer within twelve months from date application might be made to the court for an extension of time. The error assigned in this behalf is as to the award of the mandatory injunction. We think the court erred in this respect and that it had no authority to issue a mandatory injunction requiring the city to construct a sewer, irrespective of the exercise of discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and the like matters; and we think that the exercise of this authority is primarily vested in the municipality and not in the courts. We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract, but error in granting a mandatory injunction as to the sewer, and in that respect the decree will be modified, and, as so modified affirmed." When the result of the second appeal is thus tested by the contents of the final decree in which it culminated, it appears that the only adjudication ever made in favor of the waterworks company by this court is embodied in the declaration that it is entitled to a decree "enjoining the city from erecting its own works during the term of the contract." This court has ascertained and declared that such was the only result of the final decree of May 18, 1894. Side by side with that conclusion was set another in which this court declared that the city of Vicksburg possessed certain legislative powers, entirely beyond the control of the courts, and therefore entirely beyond the domain of the contract whose validity has been recognized. The court will soon perceive that the municipal ordinances,

whose validity is involved in the third and present appeal, are the outcome of the exercise of police powers to which the contract in question can not possibly extend, such police powers as no municipality can possibly bargain away.

The Third and Present Appeal.

The equity case in which the two preceding appeals were taken was numbered 41 on the docket of the circuit court, and the final decree in that case was rendered on May 18th, 1904. Shortly before and about the time such final decree was rendered, the mayor and aldermen of the city of Vicksburg, in the exercise of what they deemed their police powers, outside and beyond the influence of said contract, enacted the three following ordinances:

An Ordinance to Fix and prescribe Maximum Rates & Charges for Water Supplied to the City of Vicksburg, Where Measured by Meters, and for Other Purposes.

Section 1. Be it ordained by the Mayor and Aldermen of the City of Vicksburg, that hereafter every person, firm, company, corporation engaged in the business of furnishing water to the inhabitants of the City of Vicksburg, where the water is measured by meters and if charged for according to quantity of water so supplied in said city shall not exceed those herein named and fixed, which rates and charges are reasonable and just, that is to say, the following are the maximum rates and charges which may be so collected and made.

100 to 1000 gallons per day	40 cents per M.
1000 to 2000 gallons per day	35 cents per M.
2000 to 3000 gallons per day	30 cents per M.
3000 to 5000 gallons per day	25 cents per M.
5000 to 10000 gallons per day	20 cents per M.
10000 and over gallons per day	15 cents per M.

Section 2. Be it further ordianed that the maximum rates and charges fixed in the foregoing section shall be for the water actually taken or used; provided a maximum charge of twenty-five cents per month for inspecting and reading meters may be made where the water taken within that time amounts in value to less than that amount.

SECTION 3. Be it further ordained that such person, firm, company or corporation engaged in the business of furnishing the inhabitants of said city with water, desire that the water taken and consumed by such inhabitants shall be measured by meters and charged for according to the quantity of water taken or consumed, such person, firm, company or corporation shall put in and install and maintain such meters at his or its own expense.

SECTION. 4. Be it further ordained that any person, firm, company or corporation, or the officer or agent of such, who shall charge, collect, or receive money at a greater rate than is prescribed in Sections 1 and 2 of these ordinances, for water so furnished and supplied shall be guilty of misdemeanor, and on conviction shall be fined not less than fifty dollars nor more than two hundred dollars, or be imprisoned in the City work house or County Jail not exceeding thirty days or both for such offense.

SECTION 5. Be it further ordained that this ordinance shall be in force and take effect from and after May 1st, 1904 next.

Ordained this 18th day of April, 1904.

H. J. TROWBRIDGE,
City Clerk.

Approved this 20th day of April, 1904.

W. L. TROWBRIDGE,
Mayor.

Ordinance to Fix and Prescribe the Maximum Flat Rates and Charges for the Supply of Water to Consumers in the City of Vicksburg, & for Other Purposes.

Be it ordained by the Mayor and Aldermen of the City of Vicksburg:

SECTION 1. That hereafter every person, firm, company or corporation engaged in the business of furnishing water to consumers thereof, being inhabitants of the City of Vicksburg, shall furnish the same to such consumers thereof for domestic and other purposes and uses herein enumerated and specified at rates and charges not exceeding those herein named and fixed, which rates are reasonable and just; that is to say, water shall be furnished such persons, firms, companies and corporations *to* consumers thereof, being inhabitants of the City of Vicksburg for domestic and residence purposes and uses, where no meter has been put in or attached, for ascertaining the quantity of water used at rates and charges not exceeding or above the following named rates and charges per year (which may be collected quarterly or by the month) to-wit:

Residence occupied by one family only two rooms or less $3.00
Residence occupied by one family only three rooms or less 4.00
Residence occupied by one family only four rooms or less 5.00
Residence occupied by one family only 5 or 6 rooms.... 6.00
Residence occupied by one family only 7 or 8 rooms.. 7.00
Residence occupied by one family only 9 or 10 rooms 8.00
Residence occupied by one family only 11 or 12 rooms.. 9.00
Residence occupied by one family only 13 or 14 rooms.. 10.00
Residence occupied by one family only 15 or 16 rooms.. 11.00
Residence occupied by one family only 17 or 18 rooms. 12.00
Residence occupied by one family only 19 or 20 rooms.. 13.00
Residence occupied by one family only with more rooms for each additional room 30.00

Residence rates occupied by more than one family in addition to the rates charged for residence occupied by one family only fifty cents per year, for each additional person not a member of the family.

Bath without heating apparatus (in addition to room rate) $3.50
Bath with heating apparatus (in addition to room rate) 3.50
Buggy ..... (in addition to room rate) 3.00
Carriage ..... (in addition to room rate) 2.00
Filling cisterns per 100 gallons (in addition to room rate) .06
Cow ..... (in addition to room rate) 12.00
Dental office 15.00
Horse in addition to room rates 2.00
Sprinkling side walk and street and lawn 50 feet and under 9.00
Over 50 feet 15 cents per foot, not exceeding 3–16 inch orifice four hours per day .....
Hose for sprinkling gardens, per square foot, ¼ cent but no license less than 2.50
Water closet, self cleaning (in addition to room rate)... 5.00
Urinal in private residence (in addition to room rate) .. 10.00

The rates and charges herein provided, for water taken or consumed for domestic purposes in private residences, shall embrace and include all water supplied for such purposes in such residences, no matter through what faucets or openings admitted. Nothing in this ordinance contained shall be

construed to prescribe or fix rates and charges for manufacturing, steam or other power purposes.

SECTION 2. Any water furnished by such persons, firms, companies and corporations to consumers thereof, being inhabitants of the City of Vicksburg for offices, bank, stores, and other similar purposes where no meter has been put in or attached for ascertaining the quantity of the water used, shall be furnished at rates and charges not exceeding or above the following rates per annum (which may be charged and collected quarterly or by the month) where such water is furnished and supplied in the manner and for the purposes following, to-wit:

Barber shop, first chair	$10.00
" " each additional chair	3.00
Bath, public	15.00
Billiard saloon, each table	3.00
Blacksmith shop, each fire	3.00
Boarding house, per room	3.00
Brick work, per thousand	.10
Dyeing and scouring	25.00
Forge	3.00
Foundry, each fire	3.00
Grocery store	10.00
Plastering per square	.01½
Pool table, each	3.00
School, for every scholar	.08
Store with wash-stand and faucet	12.00
Water closet in hotel and other public places	10.00
Urinal not in private residence	20.00

SECTION 3. Any person, firm, company or corporation engaged in business of furnishing and supplying water to the inhabitants of said city, desiring to charge and receive compensation for water furnished to such inhabitants, according to the quantity of water taken, and consumed, may at the expense of such firm, company or corporation, put in and install meters of a good and reliable kind, and in such cases demand and receive pay for such water according to the quantity of water consumed instead of according to the flat rate herein provided for.

SECTION —. Any person, firm, company or corporation furnishing or supplying water to the inhabitants of the said city, or any officer or agent of any such person, firm, company or corporation who shall demand, receive or collect any money for water furnished and suppplied as aforesaid in cases cov-

ered by and included on the schedule of rates and charges fixed as a maximum rate herein, greater, and in excess of the rates and charges herein, shall be deemed and held guilty of a misdemeanor, and on conviction shall be fined not less than 50 dollars, or be imprisoned in the County jail, or the City work house for not over thirty days for each offense.

SECTION 5. Be it further ordained that this ordinance shall be in force and take effect from, and after the first day of May, 1904, next.

Ordained this 18th day of May, 1904.

H. J. TROWBRIDGE, *Clerk.*

Approved this 20th day of May, 1904.

W. L. TROWBRIDGE, *Mayor.*

"An Ordinance to Require Water Works, Gas and Electric Light Companies to Present Bills, Before Charging Damages for Failure to Pay Them When Due.

SECTION 1. Be it ordained by the Mayor and Aldermen of the City of Vicksburg that it shall be unlawful for any Water Works company, electric light company or Gas company engaged in business in the City of Vicksburg, to charge, claim or collect damages or other penalty for failure to pay bills when due, whether it be a refusal to allow discount provided for by such company to secure prompt payment, or be a charge of damages in addition to the regular bills for light, water or gas, until ten days after presenting to the debtors itemized bills for the amount due, and affording them an opportunity at the time of such presentation of paying the same.

SECTION 2. Be it further ordained that any waterworks company, electric light company, or gas company in business in said city, which shall knowingly and wilfully violate this ordinance, shall be fined in the sum of ten dollars for each offense.

SECTION 3. Be it further ordained that this ordinance shall take effect from and after this passage.

Ordained this 7th day of December 1903.

H. J. TROWBRIDGE,
City Clerk.

Approved this 8th day of December 1903.

W. L. TROWBRIDGE, *Mayor.*

Presented to the Mayor for his approval or disapproval this 8th day or December 1903 and returned to me with his approval thereon this 9th day of December 1903.

H. J. TROWBRIDGE,
City Clerk."

On March 19th, 1904, the Legislature of Mississippi passed an act authorizing cities and towns in the State to prescribe maximum rates for water supplied by water companies to the inhabitants thereof, and in pursuance of said act of the Legislature, and to meet the necessity created by the arbitrary and unreasonable rates and regulations exacted and enforced by appellee, appellants enacted the said ordinances hereinbefore set forth and approved, respectively, April 20th and May 20th, 1904. *On the final hearing of said equity case numbered* 41, *no mention, either in the record or otherwise, was made of said ordinances, and they were not considered by the Circuit Court, nor any question pertaining to the right of appellants to enact them.* For the reason that said ordinances were in nowise embraced in the record in said case numbered 41, so as to bring them within the reach of the court in that case, Appellee, *on January 7th*, 1895, *filed in said Circuit Court an original bill, thus beginning a new and distinct suit which is numbered on the docket of that court* 79. The avowed and primary purpose of the new bill was to enjoin the city of Vicksburg from enforcing the said three ordinances as hereinbefore set forth. On January 11th, 1905, only a few days after the bill was filed, a restraining order was made (record, p. 374) "enjoining defendant from in any manner interfering with the rules and regulations of complainant, the Vicksburg Waterworks Company, and the water rates for the inhabitants of defendant now in force established by the Vicksburg Waterworks Company and in any other manner interfering with complainant's contract rights, and the defendant is hereby restrained from enforcing the ordinances passed by it as set out in complainant's bill." On February 24, 1905, *before the case was at issue*, the Circuit Court committed a grave error by making the temporary injunction granted January 11th, perpetual (record p. 393).

On January 3d, 1906, the circuit court rendered its final decree, in the following terms:

Equity No. 79.

VICKSBURG WATERWORKS COMPANY,

vs.

MAYOR & ALDERMEN OF THE CITY OF VICKSBURG.

This cause coming on to be finally heard at this January Term, 1906, of this Court, upon the original bill of complaint and the answer of the defendant thereto, and all the exhibits which are made such, to said original bill of complaint and said answer, and all of the other pleas and proceedings in this cause, together with a certified copy of the charter of the said Vicksburg Water Works Company, which is filed in the record as evidence in the cause, also the petition of the defendant for a modification of the temporary injunction granted in this cause, so that the complainant shall not be authorized to cut off water from its patrons who refuse to pay the rates of complainant, claiming the right to have the injunction modified by virtue of the ordinances of the defendant, fixing water rates; and the motion of complainant to have said injunction granted heretofore made perpetual. And the Court having heard the arguments of counsel, and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its bill of complaint for full relief, it is thereupon finally ordered, adjudged and decreed:

First. That the defendant, the Mayor & Aldermen of the City of Vicksburg, be and is hereby denied the relief prayed for in its petition, to-wit, that the injunction be modified so that the Mayor & Aldermen of the City of Vicksburg shall not be restrained from enforcing the ordinances passed by them fixing the water rates and prescribing rules and regulations of the Vicksburg Waterworks Company, and that the Vicksburg Waterworks Company shall not be permitted to cut off patrons' water provided patrons pay the rates fixed in said ordinances.

Second. That said defendant be and is hereby enjoined from enforcing the said three ordinances described in said bill to-wit: An ordinance entitled "An Ordinance to fix and prescribe maximum rates and charges for water supplied to the inhabitants of the City of Vicksburg, whether measured by meters, and for other purposes," approved the 20th of April, 1904; an ordinance entitled "An Ordinance to fix and prescribe the maximum flat rates and charges for

the supply of water to consumers in the City of Vicksburg, and for other purposes," approved the 20th day of April, 1904; and an ordinance entitled " An ordinance to require waterworks, gas and electric companies to present bills before charging damages for a failure to pay them when due," approved the 8th day of December, 1903, so far as the latter relates to complainant.

That the restraining order heretofore granted in this cause on the 11th day of January, 1905, be and the same is hereby made permanent.

Fourth. That the said defendant be and is hereby enjoined from in any manner interfering with complainant's contract rights under its said contract with the City of Vicksburg entered into between Samuel R. Bullock & Company and said City under the ordinance of November 19th, 1886.

Fifth. That the defendant be and is hereby enjoined from interfering with the rules and regulations of complainant, the Vicksburg Waterworks Company, and the water rates for the inhabitants of the City of Vicksburg now in force established by the Vicksburg Waterworks Company.

Sixth. That said defendant be and is hereby enjoined from interfering with the water rates known as the flat rates now in force established by the Vicksburg Waterworks Company.

It is further ordered, adjudged and decreed that the defendant pay all costs of this cause.

Finally ordered adjudged and decreed this the 3d day of Jan. A. D. 1906.

H. C. NILES,
Judge.

The petition for a modification of the temporary injunction, referred to in the decree and omitted from the record by inadvertence, has been substituted by agreement.

From that final decree an appeal was taken to this Court and the errors assigned are as follows:

VICKSBURG WATER WORKS COMPANY,

vs.

THE MAYOR & *Mayor &* ALDERMEN OF THE CITY OF VICKSBURG, a Municipal Corporation, Defendant.

Assignment of Errors.

Now comes the defendant, the Mayor & Aldermen of the City of Vicksburg a municipal corporation, and files the following assignment or error to the action of the Circuit Court of the United States for the Western Division of the Southern District of Mississippi, in making and rendering the final decree in this cause, rendered herein on the 3d day of January, 1906, and in rendering the interlocutory decree rendered herein on the 24th day of February, 1905, upon which assignments of error the said defendants will rely on the appeal in this cause in the Supreme Court of the United States.

Assignments of Error to the Action of the Court in Rendering said Final Decree, January 3, 1906.

I.

The said Court erred in deciding and rendering a final decree in this cause in favor of the complainant, the Vicksburg Water Works Company.

II.

The said Court erred in final hearing of this cause January 3d, 1906, in not deciding said cause in favor of the Defendant, the Mayor & Aldermen of the City of Vicksburg, and in not dismissing complainant's original bill of complaint in this cause filed by it, and in not dissolving *in toto* the injunction theretofore granted in said cause.

III.

The said Court erred in enjoining and making perpetual the injunction theretofore granted and issued in said cause,

restraining defendant from enforcing the ordinance enacted and adopted by the defendant, mentioned and described in the original bill of complaint herein filed, namely: an ordinance entitled "An ordinance to fix and prescribe maximum rates and charges fc. water supplied to the inhabitants of the City of Vicksburg, whether measured by meters or not, and for other purposes, approved the 20th day of April, 1904.

IV.

The said Court erred in enjoining and making perpetual the injunction theretofore granted and issued in said cause, restraining defendant from enforcing the ordinance enacted and adopted by the defendant, mentioned and described in the original bill of complaint herein filed, namely: an ordinance entitled "An ordinance to fix and prescribe maximum flat rates and charges for the supply of water to the consumer in the City of Vicksburg, and for other purposes, approved the 20th day of April, 1904."

V.

The said Court erred in enjoining and making perpetual the injunction theretofore granted and issued in said cause, restraining defendant from enforcing the ordinance enacted and adopted by the defendant, mentioned and described in the original bill of complaint herein, namely: filed, an ordinance entitled an "ordinance to require waterworks, gas and electric light companies to present bills before charging damages for failure to pay them when due, approved the 8th day of December, 1903, so far as the latter relates to complainant.

VI.

The said Court erred in enjoining and making perpetual the injunction hereinbefore granted restraining defendant from enforcing each and every one of the several ordinances passed and adopted by said board of Mayor & Aldermen, which are set out and described in full in complainant's original bill of complaint.

VII.

The said Court erred in making the restraining order granted on the 11th day of January, 1905, in this cause perpetual, as set out in the third paragraph of said final decree.

VIII.

The said court erred in enjoining defendant from in any manner interfering with complainant's alleged contract rights under its alleged contract with the city of Vicksburg, entered into between Samuel R. Bullock & Company and said City of Vicksburg under the ordinance of November 19th, 1886, as set out in the fourth paragraph of said final decree.

IX.

The said Court erred in decreeing that the defendant be enjoined from interfering with the rules and regulations of Complainant, the Vicksburg Water Works Company, as set forth in the first portion of paragraph five of said final decree.

X.

The said Court erred in decreeing that the defendant be enjoined from interfering with the water rates for the inhabitants of the City of Vicksburg now in force established by the Vicksburg Water Works Company as set out in paragraph five of said final decree.

XI.

The said Court erred in decreeing that the defendant be enjoined from interfering with the water rates known as "flat rates" now in force established by the Vicksburg Water Works Company.

XII.

The said Court erred in holding, deciding and decreeing in effect that the Mayor & Aldermen of the City of Vicksburg of November 19th, 1886, granting to Samuel R. Bullock & Company the right to construct and operate waterworks in the City of Vicksburg to supply the said City and its inhabitants with water was and contained such a contract

with said city as that the Mayor & Aldermen could not lawfully adopt and enforce all and each or any one of the three ordinances passed and adopted by said City regulating the rates to be charged by complainant for the water furnished to the inhabitants of said city and other persons, and prescribing rules and regulations for said Company, set out and described in the original bill of complaint in this cause.

XIII.

The said Court erred in holding that the contract rights and franchises of Samuel R. Bullock & Company acquired under and by virtue of the ordinance of the said Mayor & Aldermen of November the 19th, 1886, authorizing Samuel R. Bullock & Company, their successors and assigns, to construct and operate waterworks to supply water to the City of Vicksburg and its inhabitants, became and are vested in the complainant, the Vicksburg Water Works Company, and may be asserted by it against the defendant.

XIV.

The said Court erred in holding, deciding and decreeing in effect that the adoption and enforcement of all three and each or any of the said ordinances of the said defendant set out and copied in the original bill of complaint in this cause, was in violation of and in conflict with any rights the complainant acquired under or by virtue of said ordinance of November 19, 1886, of the said Defendant, the Mayor & Aldermen of the City of Vicksburg and was in conflict with Section Ten, Article I, of the Constitution of the United States, wherein it is provided that no state shall pass any law impairing the obligation of a contract.

XV.

The said Court erred in holding, deciding and decreeing in effect that the complainant, the Vicksburg Water Works Company, had any right, privileges or franchises under and by virtue of said ordinance of November 19th, 1886, passed and adopted by the said Mayor & Aldermen of the City of Vicksburg.

XVI.

The said Court erred in holding, deciding and decreeing in effect that the rights and franchises of Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in the City of Vicksburg, acquired under and by virtue of the ordinance of said Mayor & Aldermen of the City of Vicksburg, enacted and adopted in November, 1886, authorizing by section thirteen thereof the maximum of fifty cents per thousand gallons for water furnished, passed from the Vicksburg Water Supply Company by its sale to the complainant or by the sale and foreclosure under the deed of trust made by that Company, and that it was acquired and owned by the complainant, the Vicksburg Water Works Company.

XVII.

The said Court erred in holding, deciding and decreeing in effect that the act of the Legislature of Mississippi, of March 18th, 1886, amending the charter of the City of Vicksburg, contained in the Laws of the State of Mississippi of 1886, at page 694, vested in the Mayor & Aldermen of said City the right and power to make a contract with Samuel R. Bullock & Company, their associates, successors and assigns, whereby to deprive the said Mayor & Aldermen of said City of the governmental power to fix and prescribe maximum rates of charge for water to be supplied to its inhabitants, or to fix and prescribe reasonable rules and regulations for the government and conduct of the persons who should own and operate said waterworks erected and operated under said Contract.

XVIII.

The said Court erred in holding and decreeing in effect that the act of the Legislature of the State of Mississippi, approved March 19th, 1904, entitled "An act to enable Cities, towns and villages incorporated under general or special laws of this state, to fix the rates and charges for the supply of water, electric lights or gas furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof," contained on the Laws of Mississippi of 1904, at page 231, did not have the effect

to authorize defendant to enact all, each or any one of the three ordinances set forth copied and described in Complainant's original bill of complaint filed in this cause, by which to fix maximum rates and charges for water to be furnished by complainant, and otherwise fixing rules and regulations of complainant's business as a water supply Company.

XIX.

The said Court erred in holding and decreeing in effect that defendant did not have authority to enact and enforce all three ordinances enacted and adopted by it, set out, described and copied in complainant's original bill of complaint filed in this cause.

XX.

The said Court erred in holding in effect that the said act of the Mississippi Legislature of March 19th, 1904 (Laws of Miss. 1904, page 231) and the two ordinances of the Mayor & Aldermen of the City of Vicksburg, approved April 20th, 1904, set out and described in the original bill of complaint in this cause, were in conflict with and in violation of Section 10 of Article I of the Constitution of the United States, wherein, it is provided that no state shall pass any law impairing the obligation of a contract.

XXI.

The said Court erred in adjudging and decreeing that the defendant pay all the costs of this cause.

Assignment of error to the action of the Court in rendering the decree in this cause of and on the 24th day of February, A. D. 1905.

I.

The said Court erred in rendering said interlocutory decree before the replication was filed and the issue joined on the answer of defendant.

II.

The said Court erred in overruling, and denying the relief prayed for in the petition filed by the defendant, asking a modification of the temporary injunction which had been granted in this cause on Jan. 11th, 1905.

III.

The said Court erred in granting and decreeing the injunction restraining the defendant from enforcing all or any one of the three ordinances passed and adopted by the Mayor & Aldermen of the City of Vicksburg, set out, described and copied in the original bill of complaint in this cause.

IV.

The said Court erred in holding in effect that Section 13 of the Ordinance of November, 1886, of the Mayor & Aldermen of the City of Vicksburg, set out and referred to in the pleadings in this cause, constituted a contract between the city of Vicksburg and Samuel R. Bullock & Company, their associates, successors and assigns, authorizing them to charge a maximum rate of 50cts. per thousand gallons for water furnished to the inhabitants of the city of Vicksburg, and that the City of Vicksburg had no power or authority by reason of that fact to adopt said ordinances regulating and prescribing rates to be charged by complainant for water furnished to said inhabitants.

V.

The said Court erred in holding in effect that the said section 13 of said Ordinance of November, 1886, was such a contract as that, under section 10, Article 1, of the Constitution of the United States, the Legislature of the State of Mississippi and the Mayor & Aldermen of the City of Vicksburg, acting under the authority thereof, had no power to prescribe the rules and regulations of, and the maximum rates of charges for water by, said complainant company.

VI.

That the said Court erred by said decree of Feb. 24th, 1905, in decreeing and continuing the injunction or restrain-

ing order in this cause granted on the 11th day of January, 1905.

In order therefore that the foregoing assignment of errors may be and appear of record, the respondent presents the same to the Court, and prays that such disposition be made thereof as in accordance with law and the Statutes of the United States in such cases made and provided, and that upon hearing the said final decree may be reversed and said cause remanded.

BRIEF AND ARGUMENT.

I.

Sole and only Basis of Appellee's Claim.

The sole and only basis upon which appellee rests its claim of exemption from the right of the Legislature of Mississippi to regulate water rates is Section 13 of the ordinance of November 18, 1886, set out in the record in this cause (p. 28), by which Samuel R. Bullock & Company, their associates, successors and assigns, were authorized to construct and operate waterworks for public use. Section 13 of said ordinance is as follows:

"Section 13. The said Samuel R. Bullock & Company, their associates, successsors or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water as they may determine, provided that such rates and charges shall not exceed 50 cents for each thousand gallons of water." *The only vestige of legislative authority* authorizing the Mayor and Alderman of the City of Vicksburg to enact the said ordinance of November 18th, 1886, is a part of Section 5 of an act entitled "An act to amend the charter of the City of Vicksburg, approved March 7, 1884." The act in question was approved March 18, 1886, and is contained in "Laws of Mississippi, 1886," pp. 694-95. Said section 5, is as follows: "Sec. 5. *Be it futher enacted*, That section twenty-eight (28) of said charter be and is hereby

amended by adding thereto the following: Article 29, to provide for the lighting of said city by electric lights, or other methods; *article* 30, *to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.*" These thirty-seven italicized words represent the entire authority ever granted by the Legislature of Mississippi to the municipal corporation in question to create such a monopoly against the common right and against the reserved powers of said Legislature as is claimed by appellee. This terse and simple legislative authority emphatically negatives the idea that the city of Vicksburg was to have the power to grant any special privileges to appellee whatsoever. Said city was only authorized "*to provide for the erection and maintenance of a system of waterworks to supply said city with water.*" No authority was given, expressed or implied, (1) to make the grant to appellee an exclusive one; (2) no limitation upon the power of the Legislature subsequently to regulate or reduce water rates was even hinted at. In the present record there is a studied silence upon the part of appellee as to the legislative authority under which the ordinance of November 18, 1886, was enacted. The Court will not find the act of March 18, 1886, in the record. It is nevertheless before the court as a part of its judicial knowledge. It is well settled that in the exercise of its appellate jurisdiction over the lower courts of the United States, this court takes judicial notice of the laws of all the states. Renaud *v.* Abbott 116 U. S. 277; Hanley *v.* Donoghue, 116 U. S. 1; Liverpool and G. W. Steam Co. and Phenix Insurance Co. 129 U. S. 445.

II.

City of Vicksburg not Authorized to Create a Monopoly or to Confer Special Privileges of any Kind.

"In determining *the extent of the power* of a municipal corporation to make contracts, and in ascertaining *the mode* in which the power is to be exercised, the importance of a care-

ful study of the charter or incorporating act, and the general legislation of the state, on the subject if there be any, cannot be too strongly emphasized. Where there are express provisions on the subject, these will, of course, measure, as far as they extend, the authority of the corporation. It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter or constituent statute to enter into a contract." Dillon on Municipal Corporation, §§ 443, 457. From the same high authority we take the following: "§ 362 (296) *Monopolies invalid.* The power to license and regulate a lawful and necessary business will not give the corporation the power to make contracts which create or tend to create a monopoly. 2. Chicago *v* Rumpff, 45 Ill. 90, 1867. In this case, under a power granted to the city, in its charter, to regulate and license the slaughtering of animals within the corporate limits, the common council passed an ordinance, whereby a particular building was designated for the slaughter of all animals intended for sale or consumption in the city, the owners of which were granted the *exclusive right*, for a specified period. * * * It was also held that this contract tended to create a monopoly, and was therefore void. * * * A monopoly cannot be *implied*, but must rest upon express grant. Canal Co. *v.* Railroad Co., 11 Leigh (Va.), 42, per Tucker, President. * * * § 695 (550). However it may be as respects the power of the legislature to make the grant *exclusive*, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary, or at least reasonable, implication. * * * § 727 (578). But a legislative grant of authority to construct a street railway is not exclusive unless so declared in terms, and therefore the legislature may at will, and without compensation to the first company, authorize a second railway on the same streets or line, unless it has disabled itself by making the first grant irrepealable and exclusive." This court has held that exclusive rights to public franchises are

not favored, and will never be presumed in the absence of an express grant. Wright *v.* Nagle, 101 U. S. 791; Ruggles *v.* Illinois, 108 U. S. 536. In the case first cited this Court said: "*Every statute which takes away from a Legislature its power will be construed most strongly in favor of the State.*" Thus very emphatic statement of the rule was made by this Court in Vicksburg *v.* Waterworks Co. 202 U. S., p. 469: "In considering this contract we are to remember the well-established rule in this court which requires grants or franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the Water Works Company during the period of this contract it cannot be held to have done so by mere implication. The rule as applied to waterworks contracts, was last announced in this court in Knoxville Water Works Co. *v.* Knoxville, 200 U. S. 22, decided at this term, citing previous cases." After thus correctly defining the rule of construction this Court applied it, *not to the meagre terms of the act of the legislature* which contained no words which could, by possibility, have authorized the creation of an exclusive privilege, but to the terms of the ordinance which did contain such terms. The decision was made to turn upon the words of the ordinance giving to "Bullock & Company, their associates, successors and assigns, the exclusive right to erect, maintain and operate waterworks, for a definite term, to supply water for public and private use. These are the words of the contract. * * * It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned." Counsel for appellants claimed then, as we respectfully claim now, that as the act of the legislature did not authorize the corporation in question to create a monopoly, either

expressly or by implication, all such words in the ordinance as were made the basis of the judgment of this court were non-existent, because embraced in a part of the ordinance which was *ultra vires* and void.

III.

No Contract Exemption from Legislative Power to fix Tolls, Rates, or Prices.

But the adjudication in question as to the exclusive right of appellee to maintain and operate waterworks for a definite period cannot in any manner give color to the present contention, never considered or passed upon heretofore, that the Legislature of Mississippi has deprived itself of the power subsequently to authorize the city of Vicksburg to regulate rates of charges for water, and prescribe rules and regulations for the conduct of the Water Company. The rule upon that subject has been too firmly settled by this court to admit of controversy. In Railroad Commission Cases, 116 U.S. 307, this court said: "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, *it can only be by words of positive grant, or something which is in law equivalent.* If there is a reasonable doubt it must be solved in favor of the existence of the power." After quoting that language in Freeport Water Company *v.* Freeport, 180 U. S. 587, this court held that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit statutory terms. If inferred from other powers it is not enough that the power is convenient to other powers; it must be indespensable to them. In that case it was said that a contract giving a water company the right to charge certain rates for thirty years without interference by new ordinances changing rates, is authorized by Illinois act of April 9, 1872, empowering cities and villages to contract with such companies for a supply of water for public use for a period not exceeding thirty years, and Illinois act of April 10, 1872, empowering such municipalities to authorize persons or private corpora-

tions to construct and maintain waterworks "at such rates as may be fixed by ordinance and for a period not exceeding thirty years," since, under the rule requiring strict construction of such grants, the clause "for a period not exceeding thirty years" qualifies the words "construct and maintain," but does not qualify the words "at such rates as may be fixed by ordinance." In Rogers Park Water Company *v.* Fergus, 180 U. S. 624, we are told by the court that "*The predecessor of the plaintiff in error was given the monopoly of the supply of water. That might be necessary to induce the investment of capital, and for its security the obligation of a contract might be sought and given. There was no such inducement for an unalterable rate.*" It was therefore held (1) that a contract concerning governmental functions, such as one which affects the right of a city to regulate rates of a water company, must be strictly construed; and such functions can not be held to have been stipulated away by doubtful or ambiguous provision; (2) that an ordinance granting an exclusive franchise to a water company, with the right to use streets, requiring the municipality to pay certain rentals, and binding the grantee, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise by virtue of a provision that the grantee "shall charge the following annual rate to consumers of water during the existence of this franchise," as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise. In City of Joplin *v.* Southwest Missouri Light Co. 191 U. S. 150, it was held that an implied contract that the city will not for twenty years enter into the business of commercial electric lighting, does not arise from a municipal grant to certain persons under the authority of Missouri laws 1891, p. 60, of the right to erect and maintain an electric light plant for that period, where such grant is not exclusive. In Owensboro *v.* Owensboro Water Works Company, 191 U. S. 358, it was held that a municipality is not precluded from exercising

the power to fix and regulate water rates, conferred upon it as a city of the third class by Kentucky act of June 14, 1893, §3290, by the provisions of a prior municipal ordinance granting the right to construct waterworks, which gave the grantee power and authority to make and enforce, as a part of the condition upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law, or provisions of this ordinance." In Stanislaus *v.* San Joaquin and K's R. C. and I. Co. 192 U. S. 201, it was held that assuming that a contract exemption from the reduction by a board of supervisors of water rates below a certain point was created in favor of the company organized under Cal. Stat. 1853, p. 87, as amended by Cal. Stat. 1862, p. 540, by the provisions of § 3 of the latter act, the legislature, in the exercise of its reserved power to alter or repeal, conferred by Cal. Court. 1849, art. 4, § 31, still could enact the provisions of Cal. Stat. 1885, p. 95, § 5, authorizing the supervisors to reduce the rates to not less than 6 nor more than 18 per cent upon the then value of the property actually used in supplying water to the public. By this unbroken line of authority the following principles are settled: (1) "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, *it can only be by words of positive grant.*" (2) "Every statute which takes away from a Legislature its power will be construed most strongly in favor of the State;" (3) the power of a municipal corporation to grant exclusive privileges must be conferred by explicit statutory terms. It only remains for this court to apply these rules which it has firmly settled for its own guidance, to the following provision of the Act of March 18th, 1886, the only legislation ever enacted by the Legislature of Mississippi on this subject: "Article 30, to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks?" Will any one have the hardihood to contend that that brief provision, *in which the subject of water rates is not mentioned in any shape or form*, constitutes

a surrender upon the part of the State of Mississippi of the governmental power of regulation "*by words of positive grant*;" or that the right was thus conferred upon the City of Vicksburg to bargain away that state power of regulation "*by explicit statutory terms.*" Of course no one will contend that the terms of the ordinance of November 18, 1886, are of the slightest importance, as the validity of that ordinance depends absolutely upon the terms of the act that authorized it. The State of Mississippi never having surrendered, directly or indirectly, its governmental power to regulate water rates, passed through its Legislature on March 19, 1904, an act authorizing cities and towns in the State to prescribe maximum rates for water supplied by water companies to the inhabitants thereof. Under the authority of said act, and to meet the necessity created by the arbitrary and unreasonable rates and regulations exacted and enforced by appellee, appellants enacted on the 20th of April, 1904, and on the 20th of May, 1904, respectively, the two ordinances hereinbefore set forth. *As the legislative authority for such ordinances was perfect and complete*, and as appellee possesses no contract exemption from the exercise of such regulating power upon the part of the State of Mississippi, the decree of the Circuit Court enjoining the execution of such ordinances should be reversed and annulled.

IV.

Effect of the Mississippi Constitution of 1890.

It is confidently contended that the foregoing argument entirely disposes of the only question involved in this case, irrespective of the effect of the Mississippi Constitution of 1890, which is referred to simply as a cumulative argument. The fact should be borne in mind that the original contract with Bullock & Co. was made in 1886. In that contract it was provided that Bullock & Company, their associates, successors and assigns might procure the organization of a waterworks company and assign their rights and privileges under the ordinance to such corporation. Such corporation

was organized under the name of the Vicksburg Water Supply Company on Feb. 1, 1887, and on March 1st, 1887, Bullock & Co. assigned to it said contract. Thirteen years thereafter all of the property of the Vicksburg Water Supply Co. was sold at foreclosure sale and was purchased by M. O. Crumpler who, on August 18, 1900, assigned his bid to the Vicksburg Water Works Company to which a quit claim deed was also made by the Vicksburg Water Supply Company, Oct. 18, 1900. This appellee, the Vicksburg Water Works Company, was not incorporated until 1900, *and it is not the corporation described and contemplated in the contract of* 1886. It has no possible connection with the contract made with Bullock & Co. in 1886, except through the foreclosure sale of August 18, 1900. The claim now is that as the alienee of the purchaser at such sale *it bought a certain exemption from the power of the State of Mississippi to revise and reduce water rates*, supposed to have been vested originally in Bullock & Co., under the contract of 1886. In 1890, *ten years before the organization of the corporation in question*, the State of Mississippi adopted a constitution which provides: "Sec. 178. Corporations shall be formed under general laws only. The legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever in its opinion, it may be for the public interest to do so; *Provided*, that no injustice shall be done to the stockholders." Certainly no one will deny that, under the terms of that provision, the Legislature of Mississippi has complete and perfect power to amend or repeal any charter granted since 1890 by the Governor, by and with the advice of the Attorney General, under general laws to that effect. See Code of 1892, Chap. 25, beginning with Sec. 832. Appellee came into existence under the limitations of Sec. 178, and its corporate life is and must ever remain subject to its terms. But the effort will be made to defeat that result by the contention that this appellee derived through the foreclosure sale, as an item of property, *a certain exemption from the power of the State to regulate water rates*, which, it is said, is protected by

the contract clause of the federal constitution. Fortunately that contention is overwhelmed by a line of authority in this court. In St. Louis and S. F. R. Co. *v.* Gill, 156 U. S. 649, it was said: "It has been frequently decided by this court, that a special statutory exemption or privilege, such as immunity from taxation or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute. Morgan *v.* Louisiana, 93 U. S. 217; Wilson *v.* Gaines, 103 U. S. 417; Chesapeake and O. R. Co., *v.* Miller, 114 U. S. 176." In Norfolk and W. R. Co. *v.* Pendleton, 156 U. S. 667, it was held: (1) that the Norfolk and Western Railroad Co., although the legal successor of certain other companies whose charters empowered them to fix their own charges, is itself subject to the provisions of the Virginia statute of Jan. 14, 1853 regulating tolls upon railroads; (2) that in the absence of express statutory direction, or of an equivalent implication by necessary construction, *provisions in restriction of the* right of the *state to regulate the affairs of its corporations, do not pass to new corporations succeeding to the property and ordinary franchises of the first grantee*; (3) that a mortgage of the franchises and property of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation. In Covington and L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578, it was held that a grant to each of two new corporations of "the powers, rights and capacities" which had been granted to a corporation which they succeeded, and the property of which is divided between them, does not confer on the new companies the exemption conferred upon the original company from legislation changing the rates of toll, which would prevent the company from earning as much as 14 per cent on its capital stock. See also Mathews *v.* Board Corp. Comm. 97 Fed. Rep. 400; Chicago Min. Traction Co. *v.* Chicago, 199 Ill. 533. But more conclusive than any of the foregoing is the very recent case of San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, in which it was held that "Any contract exemption from legislative regulation of

rates, possessed by a street railway company chartered before the adoption of the Texas Constitution of 1876, which by §17 of the Bill of Rights, subjects to the control of the legislature all privileges and franchises granted by it or created under its authority, *was lost by the sale of its property on foreclosure, and the acquisition of its franchise under a municipal ordinance, together with that of another company by a new corporation, incorporated since the adoption of such constitution although such ordinance provides that all the rights and privileges previously granted to the old corporation were conferred on the new one, including all the limitations, contracts, and obligations.*" It is thus settled beyond controversy that if *an exemption from state regulation of water rates* was vested in Bullock & Co. and the corporation to which it was authorized by the original contract to assign, no such exemption passed by the foreclosure sale to appellee, a corporation organized thirteen years after the making of such original contract. If an attempt should be made to combat that conclusion by the suggestion that this court has held that the contract right of Bullock & Co. to be free from competition from the city of Vicksburg passed to appellee by the foreclosure sale, the obvious answer is that that right was a contract right belonging exclusively to the City, and as such within its control. On the other hand the exemption in question from State control is a right vested primarily in the state, as to which the city had no right whatever to contract. There is no pretense that the state has ever, either directly or indirectly, granted to this appellee an exemption from its power to regulate water rates.

Appellee may refer to that clause in sec. 178 of the constitution of Mississippi which declares that the right to alter, amend or repeal may be exercised, "*Provided*, however, that no injustice shall be done to the stockholders." In its bill appellee avers:

"3d. Your orator would further show that under these ordinances it is impossible for your orator to do business on account of the fact that in the event it sought to collect its lawful demands from the consumers of water it is liable to be

imprisoned and its business wrecked, ruined and destroyed, and its power to carry on its business is being seriously impaired because its employees are restrained on account of the threat to deprive them of their liberty and publicly disgrace them.

4th. Your orator would further show that its patrons are refusing to pay their water rents and only offering to pay at the rates fixed under said ordinances passed by the defendant, and that your orator thereby has already been damaged in the sum of over twenty thousand dollars (and without relief, bankruptcy of your orator is inevitable). Your orator would further show that the amount in controversy exceeds two thousand dollars exclusive of interest and cost" (Record p. 9).

In reply to those allegations, *appellee having failed to waive an answer under oath*, appellants filed a sworn answer directly responsive to such allegations as follows:

"4. Even admitting the right of complainant to charge as much as fifty cents per thousand gallons for water furnished, the ordinance enacted by defendant fixing rates to be charged where water is not measured by meters, is not thereby affected. The ordinance of 1886 at most relates only to the rates to be charged upon water actually consumed.

"*Further answering it denies that at the rates prescribed by the ordinances herein complained of, it is impossible for complainant to do business as is alleged by paragraph three of its bill, without bankruptcy or other serious damage.*

"It admits that some of its patrons are refusing to pay the rates exacted by complainant, but avers that this is not true to the extent claimed. In this connection it avers that complainant not only claims the power to charge as much as fifty cents per thousand gallons for water, where water meters are used to measure the quantity consumed, but also the power to charge as much as two dollars per month for every meter, whether any water is taken during the month through such meter and consumed, or not.

"It avers that by one of the said ordinances complained of, defendant sought to prohibit complainant from exacting the said sum of two dollars per month where the charge for the aggregate of water passing at that time through the meter and consumed, even if paid for at the rate prescribed by complainant, would be less than that amount, and in cases

where no water at all had been consumed. In that respect it avers that even if complainant has the power to charge as much as fifty cents per thousand gallons, the said ordinance is valid and should be upheld by the Court, because it shows that under no view of complainant's alleged contract rights is it entitled to charge more than fifty cents per thousand gallons, *and that by charging two dollars per month without regard to the water consumed it charges more than fifty cents per thousand gallons, and does great wrong and injustice to the consumers of water.*

"It shows that the consumers have paid for and own the said meters and that complainant has been at no expense whatever about them.

"*It denies that complainant has been damaged in the sum of twenty thousand dollars, or that it has been wrongfully deprived of any sum whatsoever by reason of said ordinances or any of them.*

"It avers that many of the patrons of complainant are not paying the rates charged by complainant because they involve the payment of said minimum meter rate, which made the rate in excess of fifty cents per thousand gallons, and because they were not willing to pay said rate of two dollars per month, irrespective of the quantity of water used by them.

"It avers that complainant would not permit them to pay in any other manner, and that they were not even allowed to pay at the rate of fifty cents per thousand gallons unless they would pay the said two dollars per month, which as heretofore shown, is exacted in violation of complainant's alleged contract.

"It avers that a large proportion of the money which has not been paid by patrons of complainant is because of this conditions of things, and that the complainant is to a large extent the aggressor and wrongdoer, and not this defendant or the consumers of water.

"It further avers that many of the patrons of complainant are taking water by what is called "flat rates" where no meters are used, and where the amount of water consumed is not measured, and that complainant will not allow them to pay the reasonable and just rates which have been in force before the recent increase in rates made by *them*, which has given rise to this controversy, and that it refuses to accept any payment from those taking water under the "flat rate" system unless they will pay the unreasonable and unjust rates now exacted.

"It avers that if the water in such cases could be measured, the rate exacted by complainant would be largely in excess of fifty cents per thousand gallons.

"Inasmuch as the water in such cases is not measured so that the quantity of water used under the "flat rate" system cannot be determined, it avers that by virtue of said Act of the Legislature of 1904 it has the power to fix the rates to be charged under said system, they not being in any wise in conflict with the provisions of said alleged contract of 1886, even if it be in force as claimed by complainants. And it avers that its ordinance fixing the rate on "flat rate" system is valid and binding. It shows that if the complainant desires to obtain the benefit of said alleged contract on the basis of fifty cents per thousand gallons, it could and should put meters into the houses of those now taking water on the "flat rate" system, and thus enable itself to determine the quantity of water consumed by them.

"It avers that the first of the three ordinances complained of, which are entirely separate and distinct, merely provides that complainant shall not be allowed to charge damages for the non-payment of water bills, without previously having presented them to the consumer for payment. And it avers that nothing contained in said alleged contract of 1886 conflicts with the power of defendant to enact said ordinance.

"It avers that said ordinance is just and right, and a proper exercise of its police powers for the protection of the consumers against unreasonable and arbitrary rules and regulations of complainant.

"It avers that of the other two ordinances complained of, one fixes prices for "flat rates" and the other fixes the maximum rates for water passing through meters and consumed. The latter ordinance also prohibits a minimum rate regardless of the water consumed, but allows a charge of twenty-five cents per meter for examining and reading the same where no water is consumed, or where less than twenty-five cents' worth is consumed.

"It avers that even if complainant is invested with all the rights and privileges which were held by the Vicksburg Water Supply Company the only feature in any of said ordinances which can be made a legitimate subject of complaint is that which limits its rights to charge exceeding forty cents per thousand gallons.

"It avers that the provision of the ordinance of 1886 authorizing Samuel R. Bullock & Company, their successors and assigns, to adopt all needful rules and regulations gov-

erning the consumption of water, is not contractual, and that defendant under its police power may lawfully, nevertheless, adopt rules and regulations, and fix water rates to govern the operation of complainant corporation.

"It avers that the injunction granted in said cause number 41 had no further scope than to protect complainant from the acts of defendant against which it was prayed; that the ground of complaint in said bill upon which said injunction was granted was the then alleged purpose of the City of Vicksburg by virtue of the act of March 9th, 1900, to construct its own waterworks; that the said Act was repealed by the Legislature of 1904 at the instance of defendant, and that by reason thereof all rights, privileges and powers which may have been thereby conferred, ceased to have any force or effect.

"It avers that the consumers of water in the City of Vicksburg are entitled to same at reasonable rates; that the complainant corporation is a monopoly in character, and that whatever contract the city may have made with complainant the said consumers are not thereby affected and cannot be required to pay the rates exacted by complainant if unreasonable and unjust.

"It avers that the rates fixed by the ordinances complained of are reasonable and just, and that if they are not by the very terms of the Act of the Legislature of March 15th, 1904, under which they were enacted they are not enforceable.

"It avers that if complainant has suffered damage thereby, it is because of its own conduct, inasmuch as it could have immediately upon the passage of the said ordinance have instituted proceedings to test their validity, but instead of so doing it has remained inactive and demanded its own high rates, and the illegal minimum charge as hereinbefore set out, and has declined to accept any other payment from its own patrons unless they would comply strictly and literally with all of its requirements as aforesaid.

"It avers that now having secured from this Honorable Court a temporary injunction to prevent the enforcement against it of the criminal features of said ordinances it seeks to treat said temporary injunction as a permanent one, and has sent notices to all of its patrons that it will shut off their water and refuse to supply them unless they comply with its rigid and arbitrary requirements, including the payment of said minimum rate of two dollars per month, irrespective of the quantity of water consumed, and of the "flat rates" prescribed by it, although largely in excess of what is reasonable and just. * * *

"It avers that in the early part of 1903, and after the first of January, complainant increased its charges so that they were made exorbitant and unreasonable, and these rates are the ones now sought to be enforced by it.

"When said increase was made it shows that contracts with its patrons who were taking water by the year had already been entered upon for the year 1903, and they refused to pay said increased rates during that year, claiming that the contract of the previous year had been renewed by implication, and that complainant had no right to alter said contract by increasing its rates until the end of that year. If any of its patrons failed to pay the rates demanded from January 1, 1904, it was because they were unreasonable and unjust, and because said patrons were advised and believed that they were under no obligations to pay unreasonable rates.

"It avers that said rates were unreasonable and exorbitant, and that a court of equity should not aid the complainant in its efforts to exact and collect them" (Record pp. 380-385).

Thus by a sworn answer, responsive to the bill, appellants have negatived every allegation upon which appellee relies to prove *either loss, damage or injustice by reason of the ordinances in question.* Strange as it may seem, appellee, after filing a replication to such sworn answer (R. p. 394) failed to take any testimony in order to overcome the sworn allegations of appellant's answer as above set forth. The record contains no note of testimony. The submission is thus described by the circuit court in its final decree, R. p. 402. "This cause coming on to be finally heard at this Jan'y Term, 1906, of this court, upon the original bill of complaint and the answer of the defendant thereto, and all the exhibits which are made such, to said original bill of complaint and said answer, and all of the other pleas and proceedings in this cause, together with a certified copy of the charter of the said Vicksburg Water Works Company which is filed in the record as evidence in the cause, also the petition of the defendant for a modification of the temporary injunction granted in this cause, so that the complainant shall not be authorized to cut off water from its patrons who refuse to pay the rates of complainant, claiming the right to have the injunction modified by virtue of the ordinance of the de-

fendant, fixing water rates; and the motion of complainant to have said injunction granted heretofore made perpetual." It thus appears that after appellants had filed a sworn answer responsive to the bill, which denied its entire equity by alleging (1) that appellee had suffered no damage by reason of said ordinances; (2) that "after the first of January (1903) complainant increased its charges so that they were made exorbitant and unreasonable and these rates are the ones now sought to be enforced by it;" (3) "that said rates were unreasonable and exorbitant, and that a court of equity should not aid the complainant in its efforts to exact and collect them," *appellee submitted its case for a final decree without taking any testimony whatever to overcome the responses of the sworn answer.* The rule is firmly settled that under such circumstances "an allegation responsive to the bill in a sworn answer is presumed to be true, unless rebutted by the testimony of two witnesses, or one witness and strong corroborating circumstances." Foster's Fed. Prac. 1, 236, citing Vigel *v.* Hopp, 104 U. S. 441. *No possible comfort can be drawn from the testimony taken in the preceding case numbered* 41, *as that testimony was closed before the ordinances of April* 20, *and May* 20, 1904, *were enacted.* The result is that the uncontradicted responses of the sworn answer stand before the court as conclusive testimony which destroys the equity of a bill that should have been dismissed. THERE ARE NO FACTS BEFORE THE COURT, EVEN TENDING TO SHOW THAT THE ENFORCEMENT OF THE ORDINANCES IN QUESTION WILL AMOUNT TO A TAKING OF APPELLEE'S PROPERTY WITHOUT DUE PROCESS OF LAW, OR A DENIAL OF THE EQUAL PROTECTION OF THE LAWS. Stanislaus County *v.* San Joaquin and K's R. C. and I. Co. 192 U. S. 201. In rendering a decree in favor of appellee upon such a record the Circuit Judge committed a manifest error. A court of equity cannot and will not aid a party in forcing upon the public exorbitant and extortionate rates.

The water Company, being a *quasi* public corporation and undertaking to furnish to the public a supply of water, is bound to furnish it to them at reasonable rates, irrespective of any contract it may have made with the City.

Directly in support of this point is the decision of the Supreme Court of North Carolina in the case of Griffin *vs.* Goldsboro Water Co., decided in 1898, 41 L. R. A., 240 This authority fully sustains us on this question and we insist that no matter what may be decided in any suit between the City of Vicksburg and the Water Works Company, or by what Court, the consumers of the water and patrons of the Company, not being parties, are not affected thereby.

This is a most interesting case, and covers other points arising in the instant case. It holds that the public are entitled to have water at reasonable rates irrespective of any contract between the City and the Water Company. It is evident that the appellee cannot claim immunity from regulation where water is not measured, because there is nothing in the ordinance on which to base such a claim. If it desires the benefit of its alleged contract right as to charges, it becomes necessary that the water be furnished in such a manner that it can be measured. The provision in Section 13 authorizing it to "make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the waterworks," shows by its terms to have no reference to the matter of fixing rates of charges. If there should be doubt as to this (which there seems to be no room for) the presumption would be against such construction as would take from the City the right to regulate the rates.

V.

The Ordinance of December 8th, 1903.

The ordinance entitled "An ordinance to require waterworks, gas and electric light companies to present bills, before charging damages for failure to pay them when due," approved Dec. 8th, 1903 (R. p. 8) should be considered separately. In reference to that ordinance the sworn and uncontradicted answer of appellants avers "that the first of the three ordinances complained of, which are entirely separate and distinct, merely provides that complainant

shall not be allowed to charge damages for the non-payment of water bills, without previously having presented them to the consumer for payment. And it avers that nothing contained in said alleged contract of 1886 conflicts with the power of defendant to enact said ordinance. It avers that said ordinance is just and right, and a proper exercise of its police powers for the protection of the consumers against unreasonable and arbitrary rules and regulations of complainant" (R. p. 382). The purpose of this ordinance was simply to prevent appellee from cutting off the water pending an inquiry as to the just and proper amount of water bills. Where there is a controversy in good faith between appellants and the appellee, as to the amounts owing by the consumers to the appellee, the appellee should not be allowed to use the power, which it claims, of cutting off the water of its patrons and subjecting them to all the inconveniences incident thereto, as a means of coercing payment of its bills made according to its own figures and calculations, without giving them a day in Court.

The rule that a waterworks or gas company cannot cut off the supply of their patrons as a means of coercing payment of accounts which are disputed, is based upon good reason and equity. It would be an extremely harsh and unjust law to permit such an advantage in one of two contracting parties. It would practically dispense with the necessity of courts to adjudicate the rights of parties, and would give one of them the power to dictate to the other and enforce, whether right or wrong, his construction of the contract and his demands. In support of this position, see:

McIntee vs. Kingston Water Co., 165 N. Y. 27. 7 Am. Dec. in Eq.

Note under Ray vs. Gas Co. 7 Am. Dec. in Eq.

Wood vs. Auburn, 87 Me., 287. 29 L. R. A., 376.

Bienville Water Co. vs. Mobile (Ala.), 33 L. R. A., 59.

Am. W. W. Co. vs. State, 46 Neb., 194. 50 Am. St. Rep., 610.

Sheppard vs. Milwaukee Gas Lt. Co. 6 Wis., 539. 70 Am. Dec. 479.

Turner vs. Revere W. W. Co., 171 Mass., 329. 68 Am. St. Rep., 432.

State vs. Nebraska Tele. Co. (Neb.) 52 Am. St. Rep., 404.

Assuming Section 13 of the ordinance of 1886 to be an irrevocable feature of the contract and now vested in appellee, it was made by the City in its "proprietary" capacity. The ordinances fixing rates were passed by it in its governmental or legislative capacity; therefore, the complainants are not bound nor affected by the contract feature, but are entitled to the enforcement of the ordinances.

As the entire equity of the bill has been destroyed by a sworn answer whose responses have not been overcome by opposing testimony the bill should, in any event, be dismissed. All of which is respectfully submitted.

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